UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHANNON TAYLOR,

Plaintiff,

-against- 16 CV 1812 (KMK)

TRUSTED MEDIA BRANDS, INC.,

Defendant.

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United States Courthouse
White Plains, New York

January 31, 2018

B e f o r e:

HONORABLE KENNETH M. KARAS,
District Court Judge

A P P E A R A N C E S:

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THE CLERK: Honorable Kenneth M. Karas, presiding.

Case number 16CV1812. *Shannon Taylor versus Custom Video Brands, Inc.*

Counsel, please state your appearances for the record.

MR. MARCHESE: Good morning, everyone.

Joseph Marchese, Bursor & Fisher, for the settlement class. And I am joined by my colleague today, Phil Fraietta.

THE COURT: Good morning to you both.

MS. SPEARS: Good morning, your Honor.

Natalie Spears for defendant, Trusted Media.

MS. HAUSER: Sandra Hauser, also for Trusted Media.

THE COURT: Good morning to you both. Please be seated.

All right. So we're here on the application for final approval of the class settlement. I've read the papers.

Is there anything that anybody wants to add?

MR. MARCHESE: Your Honor, I've prepared some somewhat lengthy remarks and, as you know, there are no objections to the settlement or to our attorneys' fees requests. So I'm either prepared to present the remarks from soup to nuts, or just take a cue from your Honor, if

you have any questions.

THE COURT: I don't have any questions. I feel terrible that you've done all this work. So if you want to say to the client that you were brilliant in delivering these remarks, I'm good with that.

MR. MARCHESE: You know, for now, your Honor, I think I'll just maybe reserve any remarks that I have. If I hear something that kind of pops up --

THE COURT: Okay.

MR. MARCHESE: -- I may jump up.

THE COURT: Okay. Thank you.

Do you want to give a speech?

MS. SPEARS: No, thank you. Thank you for the Court's time, and just take the opportunity to do that, but other than that, we support approval of the class settlement.

THE COURT: Okay. Well, as I said, I've reviewed the papers, and so what I'm going to do is rather than have you all wait for me to draft an opinion, I'm just going to let you know how I come out on this now.

The basic terms of the settlement and the request for fees and the incentive award come down to defendant establishing a fund, a non-revisionary settlement fund in the amount of $8,225,000. That fund is going to pay all the claims to the class members, the incentive award to the

plaintiff, the notice and administration expenses, as well as the attorneys' fees.

The class members who submitted the claim form are going to receive a pro rata award estimated to be about $50. In exchange for the settlement, the defendant and each of its related and affiliate entities are going to receive a full release of all claims, "arising out of any facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions or failure to act regarding the alleged disclosure of the settlement class members, Michigan subscriber information, including, but not limited to all claims that were brought or could have been brought in the action relating to any and all releasing parties."

And just parenthetically, the law is well-settled in this circuit, as well as other courts, that class action releases may include claims not presented, and even those which could not have been presented, as long as the released conduct arises out of the identical factual predicate as the settled conduct. That was noted by the *Second Circuit in Wal-Mart Stores Inc. versus Visa USA*, 396 F.3d 96, 107. That principle applies here.

Class counsel seeks attorneys' fees of 33.33 percent of the settlement fund, which equates to $2,741,392.50, and then the class representative, Taylor,

seeks a $5,000 incentive award.

Now, before certification, class certification is proper for any purpose, whether it's settlement or otherwise, a court has to make sure that the Rule 23(a) and (b) requirements have been met. That's what the circuit has instructed in, among other cases, in *Denney versus Deutsche Bank AG*, 443 F.3d, 253, 270.

Obviously, the settlement only class has to meet all the requirements of Rule 23 with the exception of the requirement dealing with the trial. So you don't have to worry about the manageability of the trial. But otherwise, the Rule 23 requirements are not to be watered down just because a settlement might be fair and/or equitable. That's *Denney* at page 270.

Now, under Rule 23(a), plaintiff seeking certification have to meet four requirements; numerosity, commonality, typicality and adequacy of representation.

In terms of numerosity, the Second Circuit has said its presumed at a level of at least 40 members, that's from *Consolidated Rail Corp. versus Town of Hyde Park*, 47 F.3d, 473, 483. Here, the representation is that the class consists of roughly 1.1 million or so individuals. So I think we're comfortably north of 40.

In terms of commonality, that requires the questions of fact and law are common to the class. That's

from the *Meredith Corp.*, case. *That's Meredith Corp. versus SESAC, LLC*, 87 F.Supp. 3d, 650, 659. The courts in the Second Circuit haven't had the pleasure of addressing commonality in the context of claims under their PPPA. But, as class counsel points out, there are cases in the Eastern District of Michigan that have approved settlement classes for claims brought under this provision, among others is *Kinder versus Meredith Corp.*, 2016 WL 454441, *1. That's a case from 2016, February of 2016, and there are others that all say the same thing.

So the Court finds here that the question common to all class members is whether defendants disclose each of the customers' protected personal reading information to third parties in violation of PPPA, and so commonality is, therefore, satisfied. For the same reason, typicality is satisfied. And in terms of adequacy of representation, this requires the Court to inquire as to whether the plaintiffs' interests are antagonistic to the interests of other members of the class, and also that the plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. So said the Second Circuit in *Baffa versus Donaldson, Lufkin & Jenrette Security Corp.*, 222 F.3d, 52, 60.

There's nothing in the record to indicate that the plaintiff is incapable or somehow ill-suited to represent the other class members, and as for class counsel, it has

represented and, indeed, has substantiated that it has extensive experience in litigating class actions of similar size and scope, as well as complexity, including other PPPA cases. And counsel has been appointed as lead counsel in cases throughout the country. So I'm comfortable in reaching the conclusion that class counsel's qualified, and that's without hearing your brilliant statement.

Now, in addition to the express requirements of Rule 23(a), there is an ascertainability requirement which requires that a class be definite in order to be certified. That's from the *MTBE Products Liability Litigation*, 209 F.R.D. 323, 336. The touchtone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member. That's from *Brecher versus Republic of Argentina*, 806 F.3d, 22, 24.

Here the class is defined as, "all persons with a Michigan street address who subscribe to a TMBI publication to be delivered to a Michigan street address, between March 10, 2010 and July 30, 2016. As proposed, this class satisfies the ascertainability requirement as it is limited to Michigan residents who subscribed to the aforementioned publications between the prescribed time period. As such, these are sufficiently definite requirements that it is administratively feasible for the Court to determine whether

or not a particular individual is a member.

Now, turning to Rule 23(b)(3), a class has to meet two additional requirements. Common questions have to predominate over questions affecting only individual members and a class resolution must be superior to other available methods of the fair and efficient adjudication of the controversy. That's from the Supreme Court Decision in *Amchem Products*, 521 U.S. 591, 615. In terms of predominance, that asks whether the proposed classes are sufficiently cohesive to warrant adjudication by representation. That's from the Supreme Court's decision in *Tyson Foods*, 136 Supreme Court Reporter, 1036, 1045.

And again, there is case law that applies these principles directly to PPPA claims, and they've been held to satisfy the predominance requirement. So the aforementioned *Kinder* case, as well as *Coulter-Owens versus Time, Inc.*, 308 F.R.D. 524, 536. And here it's clear to the Court that common questions regarding whether defendant's practices violated Michigan law will indeed predominate over individual questions and so therefore the requirement is satisfied.

Superiority requires a showing that the class action is superior to other methods available for the fair and efficient adjudication of the controversy. I don't think I'm going to break a sweat saying that this would be

tough to do if we had to do a million cases. So I think the superiority requirement is easily satisfied. So, therefore, the Court finds that the proposed class may be certified for settlement purposes.

In terms of the fairness of the settlement, a court can approve a settlement only if the settlement is "fair, adequate and reasonable, and not a product of collusion." That's from *Wal-Mart Stores* at page 116.

In determining fairness, the Court is to look at both the settlement's terms and the negotiating process that led to the settlement. And indeed, there's a presumption of fairness, adequacy and reasonableness attached to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. All of that from *Wal-Mart Stores*. So that does include examining, among other things, the negotiating process that led to the settlement.

In terms of this point, the procedural fairness, the Court seeks to ensure that the settlement resulted from an arm's-length, good-faith negotiation between experienced and skilled litigators, said the Second Circuit in *Charron versus Wiener*, 731 F.3d, 241, 247. This is typically found where there has been sufficient discovery, for example, to inform the negotiations where the parties are represented by experienced counsel in litigating these types of claims, and

where there is significant evidence demonstrating the settlement was the product of, as I said, prolonged arm's-length negotiation, and it certainly helps that there is the assistance of a respected mediator.

Here the settlement was reached after approximately 12 months of litigation. There was, in fact, a significant exchange of information through the discovery process. This included, among other things, document production, interrogatories -- I've already commented on the quality of counsel. So there's no question there, and the settlement was reached after mediation session with Judge Maas, who is awesome, I'll just say that for the record. So there's more than enough reason to find that this settlement satisfies the procedural fairness requirement.

In terms of substantive fairness, we go with the *Grinnell* factors. I'm not going to read all of them here, you all know them.

Starting with complexity, expense and likely duration of litigation. Obviously, most class actions are inherently complex. Given the scope of the litigation here, that factor is easily satisfied.

Reaction of the settlement class, some courts have said this is perhaps the most significant factor. One of those is *Raniere versus CitiGroup, Inc.*, 310 F.R.D. 211, 218.

Obviously, a favorable response demonstrates that the class approves settlement. Here that's overwhelmingly satisfied as no class member has objected to the settlement. So that weighs in favor of approval.

Next is the stage of the proceedings and the amount of discovery completed. I've already talked about that. This case has had to go through some pretty substantial document exchanges and interrogatories and a litigation had been going on for some time before there was settlement. So that included in the document production, things like subscription records, records of transmissions of customer information, there were third parties involved, there were notices of disclosures. And, yes, it's true there were not depositions, but there were interrogatories. So this factor weighs in favor of approval.

The risk of establishing liability and damages. These are the fourth and fifth factors. In analyzing the risk to plaintiffs in establishing liability, the Court doesn't need to decide the merits of the case. That's *In Re Hi-Crush Partners, LP Securities Litigation*, 2014 WL 7323417, *8, the Court is only required to weigh the likelihood of success on the merits against the relief provided by the settlement. And the courts often approve settlements where the plaintiffs were to face significant legal and factual obstacles to establish liability.

Here the defendant has denied and continues to deny liability in this action. Thus, there is no certainty that the claims would succeed at trial if the case were to go to trial. And indeed, plaintiffs acknowledge that the case, while it's strong, is not without its risks, which, among other things, could have included a summary judgment motion. This factor cuts in favor of settlement, because the settlement provides a tangible, certain substantial relief to the class now without subjecting to the class to the risk, complexity, duration and expense of continued litigation. That's all from *Hi-Crush Partners*, *9.

The sixth factor asks about the risks maintaining class action status through the trial. Indeed, there could have been challenges from the defense about the class certification. So this factor is, at worst, neutral, and, at best, tips the scales in favor of approval.

Seventh factor asks about the ability of defendant to withstand a greater judgment. Here, there is a question as to whether or not defendant could withstand a much greater judgment because defendant has undergone two bankruptcy proceedings in the preceding ten years. So this factor cuts in favor of approval.

The eighth and ninth factors ask about the range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of

litigation.

You think someday somebody is going to cut these nine down to five factors? You should put that in your speech.

MS. SPEARS: We support that as well.

THE COURT: Right?

So under these factors, the courts need only find that the settlement falls within a range of reasonableness. That's from *Meredith Corp.* at 666. So the adequacy of the amount achieved in settlement is not to be judged in comparison with the possible recovery in best of all possible world, but rather in light of strength and weaknesses of the plaintiffs' case. Same case, same page.

So here, as I mentioned already, the settlement here is an optimal result because there is a certain recovery, this was a result that was achieved after substantial exchange of information with the assistance of Judge Maas. Given especially defendant's bankruptcy files, the Court is persuaded that the settlement fits safely within the range of what is reasonable, given all the circumstances in this case.

So next up is the adequacy of the class notice; 23(b) requires the courts must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort.

So under both the federal rule and due process considerations, the adequacy of notice to class members depends on the particular circumstances of each case.

Conformity with Rule 23(c) requirements, however, typically fulfills the due process mandate, said the Supreme Court back in 1974, *Eisen versus Carlisle and Jacquelin*, 417 U.S. 156, 173.

Now, here actual notice was attempted on all class members and actually given to 91.37 percent of the class, which is 1,006,569 class members. The identities and addresses of the class members were obtained by referencing defendant's records. And, as I said, actual notice was mailed to these individuals either by postcard or email by the claims administrator.

Notice to the remaining class members was returned as undeliverable and alternative email or post email addresses were not available.

So given this record, the Court finds that this notice procedure satisfies Rule 23 and due process. Indeed, the courts have said that for due process to be satisfied, not every class member has to receive actual notice, as long as counsel "acted reasonably in selecting means likely to inform persons affected." And I'll commit the mortal sin of citing a summary order, that's from the Second Circuit's

order in *Adelphia Communications Corp. Security and Derivative Litigation*, 271 Fed. App. 41, 44.

So that requirement has been satisfied.

In terms of the incentive award, these are common in class actions. They serve, obviously, to compensate plaintiffs for their time and effort assisting in the prosecution of the litigation, the risk incurred by becoming and continuing as a litigant, and any of the burdens that are sustained by the plaintiff.

Here class representative Taylor has requested an incentive award of $5,000. What is said about Ms. Taylor is she was critical to the ultimate success of the case, having spent approximately 30 hours protecting the interests of the class, including investigating the claims, detailing magazine subscription histories, aiding in the drafting of the complaint and also assisting in the discovery process.

In light of these contributions, which are not disputed, the Court finds that the service award is appropriate.

Then we come to the issue of attorneys' fees, which I always scrub. Here, as I said, the request is for one-third of the common fund, which is just a little more than $2.7 million. It includes, by the way, the unreimbursed litigation expenses of $6,675.53, which is a legitimate thing to seek.

Now, in assessing the attorneys' fees, the Second Circuit says that we're supposed to use one of two methods. There's the percentage of the fund method; 33 percent is typical, the *Raniere* case held that at page 216, as well 220, 222, *DeLeon versus Wells Fargo Bank*, 2015 WL, 2255394, and so that, obviously, is to take into consideration the attorneys' fees in proportion to the settlement fund as a whole.

The other method is the lodestar method, where the Court is to scrutinize the fee petition to ascertain the number of hours reasonably billed to the class and then multiply that figure by the appropriate hourly rate. That's discussed in *Goldberger*. But after computing the fee, the Court may, in its discretion, increase the lodestar by applying a multiplier based on other less objective factors such as the risk of litigation and the performance of the attorney.

Now, the lodestar method is not supposed to be used for computing attorneys' fees. In any event, we're supposed to apply the *Goldberger* factor.

See, *Goldberger* has it down to six factors.

So starting with time and labor, here the time and labor class counsel billed 502.6 hours. That covered everything from drafting the complaint to doing investigation, discovery, meetings, conferences, review of

material and negotiating the settlement.

And there was a lot of legal research that had done, too, because of the *Spokeo* decision. So there is no question that counsel have dedicated a meaningful amount of time and labor to this case.

Next is the magnitude, complexity and risk of litigation. I've already talked about this at length with respect to the Rule 23 issues. The class is over a million members. It has its own complexity, both factually and legally, and the risk of litigation was substantial for the aforementioned reasons. So this factor cuts in favor of the request.

Next is the result achieved and the quality of representation. Obviously, the result achieved is a major factor, and here the result is good for the plaintiffs. It's a substantial fund, and especially given the risk of litigation and given the defendants' financial history, the result achieved here is commendable and, obviously, reflects the high quality of representation.

Next is the requested fee in relation to the settlement. As I said, it's one-third. That's typically approved by other courts.

Public policy considerations. Here the private Attorney General role is something that does merit compensation and this case is another example of that.

So applying the *Goldberger* factors, the Court finds that the request for attorneys' fees and expenses is reasonable.

I would note that using the billing hours and billing rate, the lodestar calculation is substantially less. Indeed, there's a pretty healthy multiplier here about 11.7 times when looking at the one-third percentage. But a high multiplier "should not result in penalizing the plaintiffs' counsel for achieving an early settlement, particularly whereas here the settlement amount was substantial." That's a quote from *Beckman versus Keybank NA* 293 F.R.D. 467, 482.

So for the aforementioned reasons, the motion to certify the class and approve the settlement is granted, as well as the application for the attorneys' fees, expenses and approval of the claims administrator, and also the incentive award for Ms. Taylor.

Anything else?

MR. MARCHESE: I don't have anything.

Thank you, your Honor.

THE COURT: Anything else?

MR. MARCHESE: There was a proposer order.

THE COURT: Yes, it will be signed and docketed. I promise.

MS. SPEARS: Order.

THE COURT: It would have been fun to try the case, but good for you all.

MR. MARCHESE: We have another one before you, your Honor.

THE COURT: There you go. Hope springs eternal.

All right, then I'll bid you a pleasant rest of the day. Good to see you all.

MS. SPEARS: Thank you, your Honor.

MR. MARCHESE: Thank you.

(Proceeding concluded)